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SEP 20 2006

**OFFICE OF PETITIONS**

In re Application of  
Markus Feuser  
Application No. 09/555,301  
Filed: May 26, 2000  
Attorney Docket No: **PHD99-097**

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: **DECISION ON PETITION**  
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This is a decision on the petition to withdraw the holding of abandonment, filed August 15, 2006, under 37 CFR 1.181 in accordance with the reasoning of the decision in Delgar Inc. v. Schuyler, 172 USPQ 513.

The petition under 37 CFR 1.181 is **DISMISSED**.

Any request for reconsideration of this decision must be submitted within **TWO (2) MONTHS** from the mail date of this decision. Extensions of time under 37 CFR 1.136(a) are permitted. The reconsideration request should include a cover letter entitled "Renewed Petition under 37 CFR 1.181," or, as explained in more detail below, "...under 37 CFR 1.137(a)" or (b). This is not a final agency decision.

This application became abandoned May 2, 2006, for failure to pay the issue fee in response to the Notice of Allowance mailed January 30, 2006. Accordingly, a Notice of Abandonment was mailed June 15, 2006.

Petitioner asserts that the Notice of Allowance was never received. A review of the record indicates no irregularity in the mailing of the Office action, and in the absence of any irregularity in the mailing, there is a strong presumption that the Office action was properly mailed to the address of record. This presumption may be overcome by a showing that the Office action was not in fact received. The showing required to establish the failure to receive an Office action must include a statement from the inventor that the Office communication was not received and attesting to the fact that a search of the docket records indicates that the Office communication was not received. A copy of the docket record where the non-received Office communication would have been entered had it been received and docketed must be attached to and referenced in petitioner's statement.<sup>1</sup>

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<sup>1</sup>M.P.E.P. § 711.03(c); See Notice entitled "Withdrawing the Holding of Abandonment When Office Actions Are Not Received," 1156 O.G. 53 (November 16, 1993).

Although petitioners have provided copies from their docket records, a review of the file does not reveal that an address change or power of attorney revoking the power of attorney given Robert McDermott was filed prior to the mailing of the Notice of Allowance and thus, the Notice of Allowance was mailed to the Attorney of Record at the address of record. A review of the file indicates that a revocation and power of attorney, signed by the assignee was filed with the instant petition. The conclusion therefore is that the Notice was properly mailed to the address of record and that it would therefore stand to reason that since petitioner's address was not the address of record that perhaps the docket records for this application would not show that Notice of Allowance was received. With that, it was not the fault or an error on the part of the agency and thus, the holding of abandonment cannot be withdrawn.

## ALTERNATIVE VENUE

Petitioner may wish to consider filing a renewed petition under 37 CFR 1.137(b),<sup>2</sup> which now provides that where the delay in reply was unintentional, a petition may be filed to revive an abandoned application or a lapsed patent pursuant to 37 CFR 1.137(b).

The filing of a petition under the unintentional standard cannot be intentionally delayed and therefore should be filed promptly. A person seeking revival due to unintentional delay cannot make a statement that the delay was unintentional unless the entire delay, including the delay from the date it was discovered that the application was abandoned until the filing of the petition to revive under 37 CFR 1.137(b), was unintentional. A statement that the delay was unintentional is not appropriate if petitioner intentionally delayed the filing of a petition for revival under 37 CFR 1.137(b).

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<sup>2</sup>Effective December 1, 1997, the provisions of 37 CFR 1.137(b) now provide that where the delay in reply was unintentional, a petition may be filed to revive an abandoned application or a lapsed patent pursuant to 37 CFR 1.137(b). A grantable petition filed under the provisions of 37 CFR 1.137(b) must be accompanied by:

(1) the required reply, unless previously filed. In a nonprovisional application abandoned for failure to prosecute, the required reply may be met by the filing of a continuing application. In a nonprovisional application filed on or after June 8, 1995, and abandoned for failure to prosecute, the required reply may also be met by the filing of a request for continued examination in compliance with § 1.114. In an application or patent, abandoned or lapsed for failure to pay the issue fee or any portion thereof, the required reply must be the payment of the issue fee or any outstanding balance thereof. In an application abandoned for failure to pay the publication fee, the required reply must include payment of the publication fee.

(2) the petition fee as set forth in 37 CFR 1.17(m);

(3) a statement that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(b) was unintentional. The Commissioner may require additional information where there is a question whether the delay was unintentional; and

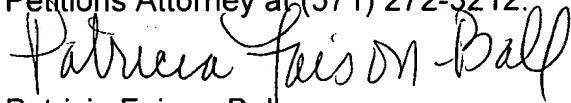
(4) any terminal disclaimer (and fee as set forth in 37 CFR 1.20(d)) required pursuant to 37 CFR 1.137(c)).

Further correspondence with respect to this matter should be addressed as follows:

By mail:      Mail Stop Petitions  
                 Commissioner for Patents  
                 P.O. Box 1450  
                 Alexandria VA 22313-1450

By FAX:      (571) 273-8300  
                 Attn: Office of Petitions

Telephone inquiries concerning this matter may be directed to the undersigned  
Petitions Attorney at (571) 272-3212.

A handwritten signature in black ink, reading "Patricia Faison-Ball". The signature is written in a cursive, flowing style.

Patricia Faison-Ball  
Senior Petitions Attorney  
Office of Petitions